IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CALEB BARNETT, et al, Plaintiffs,	)	
v.	)	No. 23-CV-00209
	)	East St. Louis, Illinois
KWAME RAOUL, et al, Defendants.	)	MOTION HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STEPHEN P. MCGLYNN

OCTOBER 11, 2023

APPEARANCES:

FOR THE PLAINTIFFS: MR. THOMAS G. MAAG

FOR THE DEFENDANTS: MR. CHRISTOPHER G. WELLS
MS. LAURA K. BAURISTA

ALSO PRESENT: MR. THOMAS YRURSA
MR. KEITH HILL
MS. KATHERINE ASFOUR
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COURTROOM DEPUTY: The Court calls case number 23-CV-209, Caleb Barnett, et al vs. Kwame Raoul, et al. The case is called for a motion hearing. Will the parties please identify themselves for the record?

MR. WELLS: Your Honor, I'm Christopher Wells for the Defendant Brendan Kelly in the Langley case.

THE COURT: Good afternoon.

MS. BAUTISTA: Good afternoon, Judge. Laura Bautista for the Defendants in the Langley case.

MR. MAAG: Thomas Maag for the Langley plaintiffs, along with Matthew Wilson, one of my clients.

THE COURT: Any other lawyers here for the other Defendants that want to identify themselves?

MR. YRURSA: Tom Yrursa here for the St. Clair County Defendants in the Harrel case, Your Honor.

MR. HILL: Keith Hill, Your Honor, on behalf of Cole Shaner in the Langley case.

MS. ASFOUR: Good afternoon, Your Honor. Katherine Asfour on behalf of the Randolph County Defendants in the Harrel case.

MR. SIEGLE: Good afternoon, Your Honor. David Siegle, S-I-E-G-L-E on behalf of the Plaintiffs in the Harrel case, 23-141.

THE COURT: Good afternoon. Anyone else? All right. We are set for hearing this afternoon on the Motion for

Summary Judgement. The specific issue is the assertion that the statute in question is unconstitutionally vague and is therefore void. There's a lot of moving parts to this case. It's a part of a number of cases that have been consolidated under the heading of Caleb Barnett, et al vs. Kwame Raoul, et al, but today principally it's the issue of whether or not this statute fails because it is vague.

Yesterday, the Government filed a rather lengthy pleading. I got it late yesterday afternoon. You had a pleading, but you also had hundreds of pages of attachments, principally deposition transcripts. The -- does the Plaintiff wish to have time to respond to that pleading?

MR. MAAG: If I can have seven days.

THE COURT: Okay. The Court will grant you seven days to respond to that pleading.

All right. Normally, in a case where the question involves the constitutionality of a statute and a challenge to it specifically claiming that it's unduly vague and therefore could not be enforced, that's generally a question of law. The parties, all though, have taken depositions and have submitted some deposition transcripts. Does the Plaintiff anticipate offering any further evidence or testimony into this record in support of the motion?

MR. MAAG: Highly unlikely.

THE COURT: Okay. Would you say that it's totally

unlikely that you're going to do it today? You don't have a witness here?

MR. MAAG: I don't have a witness here today.

THE COURT: All right. Does the Government intend to call any witnesses or offer any further evidence for the record in support of its position?

MR. WELLS: Your Honor, as we've previously indicated, we sought a discovery schedule and to follow the kind of ordinary course of discovery. The Court has allowed us two depositions. We are prepared to proceed with the argument today. Obviously, Mr. Maag has identified various factual assertions. To the extent that those weren't previously identified in his Motion for Summary Judgement, we would like to contest those, but we are prepared to proceed with argument today.

THE COURT: All right. The Court recognizes that this case involves the challenge to the exercise of a constitutional right. That is a statute that may in fact criminalize the exercise of constitutional right in that my schedule is really set by the schedule set out in the statute. The statute has timeframes in which it became effective. It has a timeframe by which citizens have to comply with certain reporting requirements. And that reporting program is now in effect, and I need to make sure that we address this, the parties get at least some sense about the issues raised as to

the constitutionality of the statute before prosecution of the violations of the statute begin in earnest.

Mr. Maag, it's your motion. Please proceed.

MR. MAAG: Thank you. Do you wish me to speak from the table or the podium, Your Honor?

THE COURT: As long as I can hear you and understand you, you can speak from wherever. You can pace back and forth. You can wave your arms. You can sit there or you can even brush your beard to try to look prophecorial (sic), whatever you want to do. As long as we can hear you clearly, I'm good with that.

MR. MAAG: Perfect. Thank you. May it please the Court, Counsel. As the Court noted, we're here on the Langley Plaintiffs' Motion for Summary Judgement as to constitutional vagueness. The motion raises several issues, but two primary issues. The first deals with magazines, ammunition feeding devices. The second deals with the list of firearms and copies, duplicates of firearms, each is addressed in a separate count. Magazines are addressed in Count 4. The firearms issue is addressed in Count 6.

Addressing the magazine issue first, i.e. ammunition feeding devices, the statute criminalizes possession, and I'll just refer to all ammunition feeding devices as magazines for simplicity, but there's a variety of them with various technical differences. But for ease of argument, I'll just

refer to them all as magazines generically.

Magazines for rifles and shotguns are limited to ten rounds under the statute. Magazines for handguns, i.e. pistols, are limited to 15 rounds under the statute. There is no obvious restriction on magazine capacity for firearms that are neither rifles, pistols nor shotguns.

THE COURT: And what sort of guns would those be?

MR. MAAG: Well, as is described in the Motion for Summary Judgement, and there are examples given, for instance on page five there is the Remington Tac-14 DM. DM for detachable magazine. It is neither a rifle, a pistol or a shotgun. The Federal ATF classifies the firearm as a, quote, other. I'm not sure that the State of Illinois classifies it as anything.

THE COURT: Is that gun covered by this ban or is it unclear?

MR. MAAG: It is unclear to me that the gun is covered by the ban. I would say it's probably not because the gun itself is a pump action, but it's not clear to me because of the way the ban is written. It is rather vague. But I will assume for the purposes of argument today that the Remington Tac-14 DM itself is not covered by the ban.

The magazine used the Remington Tac-14 DM is the identical magazine used in the Remington 870 DM shotgun. So it is unclear whether the ten round restriction for shotgun

magazines applies to the magazine in the 870 Tac-14 DM.

But more substantive, I think, is that even if we exclude what the federal Government, the ATF classifies as other guns, as is noted on page 9 with photographic examples of the summary judgement motion, the Beretta 92 pistol, which the US military used for years as the M9 pistol, uses the exact same magazine as the Beretta CX4 Storm rifle. The magazines aren't just interchangeable, they're the same magazine. You can take the magazine out of one and put it in the other. The standard magazine for a Beretta 92 or M9 pistol is 15 rounds. The magazine was probably originally designed for the pistol so the question becomes if a person finds a Beretta 15 round magazine, is that a rifle magazine or a pistol magazine? Is it subject to the regulations of a rifle restriction of ten rounds or the pistol restriction of 15 rounds? Does it matter whether the person owns both a rifle and a pistol? There is no objectively identifiable way to determine simply by looking at the magazine whether or not it is a rifle or pistol magazine under the statute as the statute doesn't clarify and they are, in fact, interchangeable.

But as noted in the motion, the Beretta 92 magazine or M9 magazine is not unique in this fashion. If it was, maybe the State could simply say, well, that's just as applied to that particular strange set of firearms.

But if you look at the Ruger brand, Ruger, the record shows, makes a 5.7 millimeter pistol and a 5.7 millimeter carbine, both of which use the same magazine. The record indicates the magazine originally designed for Glock pistols are ambiguous in nine-millimeter carbines used in the Kel Tec Sub 2000, used in numerous pistol nine-millimeter and other pistol caliber carbines. Are they restricted to 15 rounds or ten rounds or does it matter if one of the firearms assembled is something other than a rifle or a pistol?

Even what is referred to as STANAG magazines or M16 or quote/unquote AR-15 magazines have the same problem. There are both rifle and pistol -- rifles and pistols that use that same magazine. The same is true for US M1 carbine magazines. Is a 15 round USM1 carbine magazine, the original standard of the USM1 carbine of World War II, of which there are both a pistol version currently manufactured by Inland Manufacturing and previously made by Iver Johnson, and the original rifle version made by a variety of defense contractors during World War II and currently made by Inland Manufacturing.

THE COURT: Can you spell that for the court reporter?

MR. MAAG: I-N-L-A-N-D.

THE COURT: I was mishearing you and I thought maybe she would too. Let me just stop you there. Isn't it very simple to say, well, you can use your 15 round magazine in

your Beretta pistol, but you can't eject it and throw it into your Beretta rifle?

MR. MAAG: The statute does not say that. The statute does not criminalize the use of a 15 or even a 30 round magazine in a rifle. In fact, the statute grandfathers existing possession of magazines already possessed over 10 or 15 rounds and there is no restriction on their use just so that you're on your own property or a shooting range or the like. If the State had intended, they could have said you may not use an over 10 round magazine in a rifle or you could not use an over 15 round magazine in a pistol, but that's not the statute they wrote, and the State is stuck with the statute it wrote. I hope that answers your question, Your Honor.

As noted in the Summary Judgment Motion, it's the possession of the magazine or the transfer of the magazine, not the use that is prohibited. Examples as indicated in the record right here are include Glock 1911, CZ75 magazines, AR-15 type magazines, AK-47 type magazines, a whole host of magazines. In fact, if you look at what the State just filed yesterday in their assault weapon identification guide, which was attached to one or both of the deposition transcripts and I think it's fundamentally based on what you ordered the state to produce earlier in this case, there are if you just look at what they filed on page 57, 56, 57, 58, 59, what they call AK-type pistols. If you look on page 20, 19, 21, 22, 23 and

35 have what they call AK-type rifles using the same magazine; the same for AR, what they call AR-type rifles and pistols on page 62, 63, 64, page 29, 30, 31; FAL-type rifles and pistols on page 68 and 45, XP-89 aka HK94 rifle and pistol versions of the MP5, H&K submachine gun on page 69 and page 47 of their filing, the same magazine.

The Ruger 1022 magazine, probably the most popular 22 rifle in the United States today, millions of them have been sold, probably millions in the State of Illinois alone. On page 17, they have got a picture of the rifle with the magazine that is the same magazine on page 70 being used in a pistol.

Thompson submachine gun-type magazines, clones of the submachine gun, rifles and pistols using the same magazine on page 77, page 51, page 52, page 53. I could go on, but their own exhibit demonstrates that there is no genuine issue of material fact that the identical magazines fit both rifles and pistols.

The record in this case indicates no objective way that a person of ordinary intelligence can discern whether a given magazine is for a rifle or a pistol or in some cases even a shotgun or an other.

THE COURT: Well, doesn't the vagueness standard merely say that it's sufficient if the citizen is provided fair notice as to what conduct is forbidden and what we are to

look for is sort of the -- what is the core nature of the statute, so if it says -- if you're going to have a rifle, you can't have a magazine that can be used in that rifle that has more than 15 rounds. So you may have to pick and choose. If you want the Beretta pistol, then don't get the Beretta rifle because it would be very easy to take the magazine out of the Beretta pistol and put it in the rifle and that would make it clear that the violation of what the statute is saying is prohibited conduct.

MR. MAAG: I agree the State could have done that, Second Amendment issues aside, but that is not what the State actually did in this case. In this case, the State banned possession or transfer of the magazine in isolation whether you have a rifle, pistol, shotgun or not. A consumer need not even own or possess a rifle, pistol or shotgun to be subject to the magazine restrictions of the statute.

Could they, i.e. the State, have said it is illegal to put a 15 round magazine into a rifle? Yes. Second Amendment issues aside, yes. But again, that's not what they did. And it's not up to this Court or any other court to write the statute that the legislature should of or could have written when they didn't write it.

So in direct answer to your question, interpreting the statute in a way that is different than the way it is written is not appropriate and the answer is no, the statute

doesn't prohibit that.

THE COURT: One of the tests we look at in determining whether -- one of the tests that has been applied in cases challenging the enforceability of a statute on argument that it's vague is whether or not there is a knowledge or knowable or knowing or mens rea or scienter standard in the statute. Isn't it true that the Seventh Circuit and even the Supreme Court has told us that when you have that aspect and there's a mens rea aspect to the criminal statute, that addresses much of the concerns about whether it's unduly vague or not? Now, this does have a mens rea or scienter or knowingly do certain things as part of the statute, does it not?

MR. MAAG: The direct answer yes, but there is almost certainly a mens rea that would have to be produced such as in the *US v. Staples* or *Staples v. US* case, I forget which way it goes, which is a US Supreme Court case that deals with knowing possession of machine guns; in that case, a semiautomatic AR-15 rifle that apparently either depending on who you believe which converted or malfunctioned into firing fully automatic.

In that case, the Supreme Court said that as firearms are traditionally -- semiautomatic firearms, such as the AR-15, are traditionally held for lawful purposes that you have to prove that the Defendant had knowledge of the physical

characteristics that brought it within the ambit of the statute.

The mens rea does not go to knowledge of the law, which is irrelevant unless the statute says so, and as far as I can tell the statute doesn't. So the mens rea would go to whether or not a given magazine could hold ten rounds versus 13 rounds versus 15 rounds versus 16 rounds, not is this -- and of course, this goes back to the vagueness question, is this a rifle magazine, a pistol magazine or a shotgun magazine of which there's no way to tell. And this is an area that is protected by a fundamental constitutional right; therefore, that is one of the issues or factors that the Court is to consider in a vagueness challenge. The established test in a criminal statute -- and this is a criminal statute -- is void for vagueness if persons of ordinary intelligence are unable to ascertain what actions are illegal.

In this case, a person of ordinary intelligence cannot ascertain whether a 13 round magazine is legal under a given set of circumstances. It might be. It might not be. It all depends on what I guess the police officer thinks when he interacts with the citizen, what the prosecutor thinks when the police officer brings the case to him to determine whether to prosecute, what the trial court judge thinks when he's considering a motion for directed verdict, and ultimately, what the jury thinks, and that is the very definition of a

vague statute. You don't leave it up for that big long list of people to arbitrarily just decide willy-nilly whether or not a statute's prohibitions are triggered, which is what this does here.

As I stand here today, I don't have a clue whether a 13 round magazine that will fit in either a rifle or a pistol, excluding the grandfathered items, can be possessed in the State of Illinois. I don't have a clue if I see a magazine laying on the ground that I'm not familiar with whether or not that's a rifle, pistol, shotgun or other magazine or even -- I can potentially figure out how many rounds it holds if I could discern what caliber it is, which that should not be too hard to do, but without knowing the design history, what is being manufactured, what is on the market and even then there's no way to objectively discern whether a given magazine is a rifle, pistol, shotgun or other magazine.

The other part of this motion, which is brought under what I'll call for lack of a better term the copycat provision of the statute wherein specific firearms, including copies, duplicates, variance or altered facsimiles with the capability of any such weapon, and there's a long list, are prohibited. That smacks straight into the *Springfield Armory vs. Columbus* case. I believe that was Sixth Circuit which was cited in the brief moving papers and which I think is completely controlling here. Just as in *City of Columbus*, this statute

prohibits for all AK types, even if I assume the statute doesn't define it in any way, but even if I assume that AK type means A-V-T-O-M-A-T, K-A-L-N-I-K-O-V, Model 1947 rifles or things based on that rifle, I'm not sure exactly what that means. And the example that I give this is really fascinating and shows just how little the legislature understood about the topic they were legislating on is under the AK-type rifles that are prohibited is SKS with detachable magazine.

As the record in this case shows, both the moving papers and if you look at the depositions filed by the State just yesterday or if you look at their own assault weapon identification guide, an SKS isn't even remotely similar to an AK-47. I could certainly bore the Court with the technical details of why, but they're completely different designs. It's like saying a Ford F-150 is a copy of Daimler Gottliev's original motor car of the late 1800s. Yeah. They've both got a gasoline engine and four tires, but that's about where the similarity ends.

A person of ordinary intelligence, even if they had some knowledge of firearms, cannot look at this list of AK types with SKS with detachable magazine on the list and have any clue what that means, what is prohibited. As noted in the *Columbus* case, what if you change the caliber, what if you make it a 0.22, what if you paint it a different color, what if the barrel is little longer and you put a different type of

scope on it.

The same is true in what is on here, AR types. As a matter of historical fact, AR in AR-15 refers to the company that originally designed it, Armalite, once upon a time out of Costa Mesa, California, if I remember correctly. I believe they're located in Illinois today, but there was a whole series of AR model rifles and a couple of AR model pistols. I think there was even one AR model shotgun if I remember correctly. Are all of the AR models designed by Armalite or marketed by Armalite prohibited? The example given in the moving papers is the AR-7, which is a 0.22 caliber rifle that disassembles into its stock. It is marked AR-7.

If a police officer stops a citizen or sees a citizen at a shooting range with an AR-7 and says that's an interesting rifle, can I see it? Oh, that says AR on it. This ban prohibits all AR types. You're under arrest. Is that what the legislature intended? I don't know. It says all AR types. It doesn't say all AR-15 types, but even if it said all AR-15 types, the only gun I've ever seen marked AR-15 was sitting in the armory of the University of Mississippi ROTC armory room and it itself was a converted M-16 A1 who was converted to A2 specifications, literally a fully automatic rifle. I had never seen a semi-automatic rifle marketed as an AR-15. Maybe they exist. I don't know. But that's my personal experience.

And as you go down the list, much like the SKS listed under AK-type firearms, on the list -- let me find it here -- Beretta AR70. An AR70 is not an Armalite design. It is not based on an Armalite design. You can find a nice example of it shown in the State's identification guide in the record. Thank you.

It is a stamped sheet metal fully automatic firearm. Certainly there are some semi-automatic plums, copies, whatever words you want to use, floating around there. I think some of them are even made by Beretta. But it's certainly not what even a firearms aficionado would call an AR-type firearm. The only thing it has in connection with an AR-15 is probably the shadow.

THE COURT: Lets get back. The test for vagueness, we look at the statute and we ask does it have a substantial understandable core and this statute identifies specific what? Many of them. It explains attachments that handguns can have and may not have. It explains attachments that rifles that are semi-automatic may have or may not have. It specifically excludes bolt-action rifles. It specifically excludes rimfire.

MR. MAAG: No, it does not. Only in magazines and in that, only in tubular magazines.

THE COURT: But there's a specific exception where it says you can have more than 15 in a magazine for a rifle if it

is that they're rimfire cartridges up to 25.

MR. MAAG: If it is a tubular magazine like in Marlin Model 60.

THE COURT: So apparently you are able to discern very specifically what this statute says you can't have when it comes to rimfire ammunition. Can't you go through this and say, all right, this is -- the ordinary person go through it and say, all right, I'm not a firearms expert, but I understand what a handgun is. It's one I hold in my hand and fire. I understand what a rifle is or a shotgun because they're more shoulder mounted weapons. I understand they are variations, but isn't there an understandable core as to what they're trying to regulate in this?

MR. MAAG: Let's look at page 28 of their assault weapon identification guide that should have been filed yesterday as I understand it.

THE COURT: Well, let me just stop you. You can give me one example or you can give me five examples of specific things that might be questionable, but when you read the statute in its entirety, isn't there a substantial understandable core that this is infringing upon or I should say it is restricting what firearms and what attachments both in terms of handguns and shoulder held firearms that you can have and that you cannot have.

MR. MAAG: There are two different sections of the

statute as it relates to firearms, excluding different classifications, i.e. rifles, pistols, shotguns. You have what I'll call the features test and then you have the delineated list, including copies, duplicates, variance, et cetera. Our motion is not based on the features test. I agree a person of ordinary intelligence can look at a firearm with a threaded barrel or a flash suppressor or a folded stock and say, yes, that has a flash suppressor or possibly a threaded barrel depending on whether they mean a threaded muzzle or a threaded breech, but that is a different issue, or whether it has a folding stock or whether it has a pistol grip that protrudes conspicuously beneath the action of the firearm to quote a different statute, not this statute.

That is a different question than what is challenged here. What is challenged here is let's assume that you took an AR-15, an original AR-15, and said I want to sell as close a copy of that as I possibly can in the State of Illinois and not violate the statute. Well, let's start by chopping the threaded barrel and the flash suppressor off, and then let's take the pistol grip off and put a straight line stock on it. And then while we're at it, let's make it a fixed magazine so it's not even a detachable magazine, and as the coup de grace, as it were, let's change the caliber to something obscure that nobody has used in years. It's obsolete so they can't say it has anything whatsoever to do with an AR-15. How far do they

actually have to go before a given firearm is no longer an AR-type firearm?

And the same thing goes for an AK. An M1 Garand uses the identical gas and bolt system as the AK designed by Kalashnikov. In Kalashnikov's original prototypes he started off ripping off the Rams M1, and it just kind of morphed into what it ultimately became. As noted by the State's own firearm identification guide, they have Armalite M15 0.22 caliber carbine on page 28 which is I believe listed in the actual statute. That firearm has no gas system. It's a direct blow back 22. It uses a different magazine. The grip might be interchangeable with the original AR-15, but I doubt many of the other parts are. It is designed to look like an original early '60s, late '50s, AR-15 rifle by Armalite, but that doesn't mean it is.

If you take off the flash suppresser, you cut the barrel off at the ends so there's no threads on the end of it. You take off the pistol grip, well, then it doesn't fail the features test in the statute. The question is, is it still prohibited as a copy, duplicate, variant or altered facsimile with the capability of any such weapon. And as noted in *Springfield Armory* there's no objective test. There's no way that a person of ordinary intelligence, even if they're familiar with firearms, can discern that. It's a different question whether or not it fails the features test or the

duplicates test.

THE COURT: You had mentioned earlier grandfathering in certain weapons. There's a registry required by the statute, is there not?

MR. MAAG: Yes. All grandfathered firearms, as I understand it, are required to be registered.

THE COURT: Does the Federal Firearm Owner Protection Act prohibit states from creating or mandating gun registry?

MR. MAAG: There is language in the statute that does prohibit that. Exactly how that is to be interpreted vis-a-vis this case I haven't done the research on, but I'm aware of what you're talking about. That's obviously not before the Court today. I believe that the federal statute just offhand maybe restricted to using federal money to create such a registry, but again, that's not before the Court today.

The registry also requires registration of as near as I can tell rifle stocks, 50 caliber ammunition, 50B and G ammunition, specifically, and a whole host of items that I don't think that the people of the State of Illinois really realize is subject to registration under this act. The way that the statute is written, the spring in this pen may well be considered an AR-15 part because this spring is nearly identical to the spring -- if not completely identical -- to the spring that holds the detent pin on a buffer on an AR-15. That spring may technically be subject to registration, but

that's a different issue than the subject motion here today.

THE COURT: All right. Any further argument?

MR. MAAG: Not at this time. Thank you.

THE COURT: All right. We've gone 45 minutes. I'm going to give my court reporter a break. We'll take a five-minute recess, and we'll come back and we'll hear from the Government.

(Recess taken.)

THE COURT: We are back on the record. Mr. Wells, please proceed.

MR. WELLS: Thank you, Your Honor. The Langley Plaintiffs' motion should be denied for two clear-cut reasons. First, the statutory terms at issue have a core of understandable meaning and the Seventh Circuit has said a core of meaning is enough to reject the vagueness challenge to a criminal statute.

Second, the statute has a knowing mens rea requirement that completely forecloses this vagueness challenge. These obstacles are particularly insurmountable because the Plaintiffs are bringing a facial challenge. Because this is a facial challenge, Plaintiffs needed to show that no set of circumstances exist under which the law would be valid. They have not come close to meeting this extraordinarily high burden.

Plaintiffs' motion gets the standard for a facial

challenge based on unconstitutional vagueness exactly backwards. Instead of focusing on whether the statute has a core of understandable meaning, as the Seventh Circuit requires, Plaintiffs focus on the periphery. Plaintiffs, as we heard, have identified two narrow ways in which they claim the statute is unconstitutionally vague.

Their entire focus in their first vagueness claim is on a subset of magazines in the 11 to 15 round range that can potentially be used in rifles as well as handguns. Their entire focus in their second vagueness claim is on a handful of firearms that they claim are on the edge of what counts as an AR type or AK type. Both of these challenges the periphery of its statute's meaning, not its core. According to the Seventh Circuit, arguments about peripheral ambiguities are not sufficient for a facial challenge based on alleged unconstitutional basis.

I'm quoting directly from the *Trustees of Indiana University* case, which we cite throughout our brief, quote, a core of meaning is enough to reject a vagueness challenge leaving to future adjudication the inevitable questions of the statutory margin.

At the absolute most, all the Langley Plaintiffs have put forward are speculative questions at the statutory margin. That showing falls short of their burden to show that the challenge statutory terms lack a core of understandable

meaning. Plaintiffs' facial challenge fails for the additional reason that the statute has a knowing mens rea requirement. For anyone to be convicted under the statute, they would have to knowingly sell, purchase or possess a prohibited assault weapon or magazine.

The Supreme Court has repeatedly rejected void for vagueness challenges from multiple criminal statutes, from highly controversial contexts where the statute has a knowledge scienter requirement.

Gonzales vs. Carhart, 2007 case, upholding a partial birth abortion ban. The Supreme Court said there, quote, the Court has made clear that scienter requirements alleviate vagueness concerns.

Holder vs. Humanitarian Law Project, 2010 Supreme Court case, upholding a statute prohibiting, quote, material support for terrorist organizations. There, the Supreme Court said, quote, the knowledge requirement of the statute further reduces any potential for vagueness as we have held with respect to other statutes containing a similar requirement.

Hill vs. Colorado, 2000 Supreme Court case, rejecting a vagueness challenge an eight foot buffer law for people protesting outside of an abortion clinic. Again, a very controversial context. The Court said that the vagueness concern alleged by the Plaintiffs was, quote, ameliorated by the fact that the statute contains scienter requirement.

The Seventh Circuit for its part has recognized that a knowledge scienter requirement obviates vagueness concerns for so-called multipurpose objects like the 11 to 15 round interchangeable magazines that the Plaintiffs are focused on.

The object itself is not intrinsically legal or illegal. What matters is a person's conduct and intent regarding the object. As the Seventh Circuit said in the Levus and Levus case, which we cited in our brief, if you're knowingly selling a paperclip as a roach clip, then you're selling drug paraphernalia. But if you're selling the same paperclip as office supplies, then that sale is perfectly legal. So the same object can either be sold illegally or sold legally.

The intent requirement operates the same way here. Selling an 11 to 15 round magazine knowing it's for a handgun is legal. Selling an 11 to 15 round magazine knowing it's for a rifle is not. So even if Plaintiffs edge cases were relevant in this facial challenge, which they're not, the statute's mens rea requirement means that it is not by definition a trap for the innocent, only knowingly violating the statute is punishable.

So those are the two principle reasons under the legal standard why this motion fails; the act has a core of understandable meaning and Plaintiffs' peripheral examples by definition are insufficient to invalidate the act. And

second, the act's mens rea requirement forecloses Plaintiffs' facial challenge. So at its foundation, the motion is fundamentally inconsistent with the legal standard.

I now want to address specific flaws that the arguments that the Plaintiffs make regarding magazines and the AR-type and AK-type issue. Plaintiffs' argument about the interchangeably of some magazines is a textbook example of focusing on the periphery, not the core. The scope of Plaintiffs' challenge is limited at the outset to 11 to 15 round magazines. There's a whole group of magazines out there that Plaintiffs know have a capacity of 16 or more rounds. They aren't claiming to be confused about whether those magazines are restricted under the act. So right out of the gate, we're talking about a subset of magazines.

Plaintiffs' challenge to the magazine capacity limit is also based on a hypothetical that bears no resemblance to the real world. I call it their magazine in a vacuum scenario. Their complaint is not that people in the real world going to a gun store to pick up a magazine for their firearm are uncertain about whether the 15 or 10 round limit applies. If the magazine is for a handgun, the 15 round limit applies. If the magazine is for a rifle, the 10 round limit applies. Plaintiffs' complaint is not about the real world. It's about this hypothetical.

If you hand someone a magazine that they've never

seen before -- I think Mr. Maag referred earlier to if I saw a magazine on the ground over there, right? So if you hand someone a magazine that they've never seen before and you provide no additional information about it, then it can be hard to tell whether that particular magazine is for a handgun, a rifle or both.

But the question in a vagueness challenge is not whether some object viewed in isolation is or is not, quote, legal in Illinois. The question is whether the statute gives people notice of what they can and cannot do. And as with many, many other criminal statutes what you can and cannot do depends on your intent.

Out there in the real world, people aren't examining an unknown magazine devoid of context. They're buying a magazine for a firearm they own knowing whether that firearm is a handgun or a rifle. They're choosing which magazine to carry with their concealed carry handgun. In those real world contexts, people can readily understand that purchasing a 15 round magazine is legal when the magazine is for a handgun, but not when the magazine is for a rifle. Plaintiffs' magazine argument is both speculative and peripheral and that type of argument is insufficient for a facial challenge based on vagueness.

I'd now like to turn to Plaintiffs' second argument. Plaintiffs' argument about AR types and AK types is also the

textbook example of focusing on the periphery, not the core. Plaintiffs start off on the wrong foot by asking the wrong question. The question is not whether a specific firearm is or is not properly characterized as an AR type. The question is whether a definition of an assault weapon gives a person of ordinary intelligence fair notice of what the law prohibits.

So once again, right out of the gate, Plaintiffs are getting the focus of the inquiry wrong. But even Plaintiffs' evidence shows that AR type and AK type have a core of understandable meaning.

There are 43 specifically named rifles listed as AR types in the statute. Out of that list of 43, Plaintiffs' own witnesses have identified a total of six that they think may not be an AR type. When even Plaintiffs' own witnesses acknowledge that 37 examples out of 43, 86 percent of the list, fall into the AR-type category, that suggests that the category has a core of understandable meaning.

And of the six examples that Plaintiffs' witnesses identified that they disagree with the categorization of whether or not it's an AR type, they haven't indicated that any of those six would fail the features based test. So those six particular firearms that they quibble with on the list would nonetheless be assault weapons whether they had been listed as AR types or not because they meet the features based definition, which as Mr. Maag indicated he's not contesting at

this point.

So the Plaintiffs in their reply brief and supporting documents in their reply identified certain specific examples that they question whether or not those are AR types. There were five in particular that I think were pictured in the declaration that was submitted in reply. Three of the examples were either pump action or bolt action, which as Your Honor acknowledged there's a specific exception in the statute for pump action or bolt action.

The AR-7, Plaintiffs in their depositions specifically acknowledged that it's a very different rifle than the AR-15. The only reason they claim to be confused is because it uses the letters AR. It doesn't -- the AR-7 does not have in the terms of the statute by their own admission the capability of the listed weapons. Nor does the picture they have shown of the AR-7, does that particular rifle have the characteristics that would bring it within the characteristics based definition.

The fifth picture is not identified by name or model and there's no information about where the picture even comes from. But again, the focus here is entirely wrong. It's entirely away from where the Seventh Circuit says the focus should be, which is on the core, does the statute have a core of understandable meaning. The Plaintiffs' own witnesses demonstrate that it does.

As for the AK-type question, Plaintiffs' argument there is even weaker. Out of the 27 specifically listed AK-type rifles in the statute, Plaintiffs' declarations identified one, the SKS with attachable magazines that they think is a misfit on that list. So for 26 out of the 27 rifles listed under AK-type, 96 percent of the list, Plaintiffs aren't disputing that they're, in fact, AK types. Again, that's a pretty clear indication that there's a core of understandable meaning even if we're just focusing on the subcategory of AK type, not the broader relevant category of assault weapon.

As for the SKS itself, Plaintiffs made various comments earlier about the AR-15 particular model that uses 0.22 caliber ammunition, well, the SKS shares the same caliber of ammunition as the AK-47. It was developed in competition with the AK-47 in the same country for the same military around the same time period, so it's not as if the SKS was just plucked out at random.

But again, taking issue with one out of 27 illustrative examples is not a basis for facially invalidating an entire statute based on alleged vagueness. Because the definition of assault weapon has a core of understandable meaning that is evident from both the characteristics based definition and the make and model list, Plaintiffs' facial challenge fails. But even if this Court were to find merit in

Plaintiffs' claims, any relief must be limited to the specific terms that Plaintiffs' claims are unconstitutionally vague.

This is an 111-page piece of legislation with a severability clause. Plaintiffs claim in their opening brief that there is no severability clause, but that's wrong. There is. Section 97 of Public Act 102 1112. Given that there's a severability clause, it would be an incredibly sweeping ruling to invalidate the entire legislation based on a handful of terms like AR type and AK type, which is what the Plaintiffs have requested here.

It would be particularly inappropriate to grant that relief in a case where Plaintiffs prematurely filed a Motion for Summary Judgement before any discovery had taken place. In a ruling in joining anything other than the specific terms Plaintiffs challenged in their motion would be the type of judicial overreach that the Seventh Circuit has cautioned against in considering facial challenges.

So what the Plaintiffs are requesting is truly extraordinary. They want to facially invalidate a statute because they claim it is unconstitutionally vague. The legal hill they are attempting to climb could not be higher and they have not done it. The challenged statutory terms have a core of understandable meaning. That's all that is required to defeat Plaintiffs' motion. The challenge statute also has a mens rea requirement that eliminates any basis for facially

invalidating the act.

THE COURT: With respect to this act, would you agree that legislature advanced that its desires was to avoid mass shootings like the instance that happened in Highland Park?

MR. WELLS: There's certainly evidence in legislative history that that indicates that was a key factor.

THE COURT: Was one of the purposes of this statute to deprive the rights of citizens to self defense?

MR. WELLS: I do not believe that that was a purpose of the legislature.

THE COURT: All right. Would you agree that there's some arguments about -- the parties are arguing about whether magazines constitute bearable arms or not, but would you agree that some of these guns that are identified that are being outlawed are arms as defined by the Second Amendment?

MR. WELLS: I think consistent -- first of all, I don't think Plaintiffs have moved on the Second Amendment. I think they've moved on Fourteen Amendment claims. As we stated in the prior oral argument, I think we do not agree that what is listed in the statute are arms within the meaning of the Second Amendment subject to protection.

THE COURT: All right. But you would -- all right. So there's a couple of ways in which the Courts have looked at the issue of vagueness. In the *Davis* case, the Supreme Court addressed issues of categorical approach versus a case

specific approach when addressing whether or not a person's prior conviction was a crime of violence. Are you familiar with *Davis*?

MR. WELLS: I am. All though, I don't believe that the Plaintiffs cited it, but I am.

THE COURT: Well, I can do my own research.

MR. WELLS: I understand.

THE COURT: And so in *Davis*, the issue was whether a prior conviction for a crime of violence would go into the calculation of whether or not someone could be considered an armed career criminal; fair enough?

MR. WELLS: That's consistent with my recollection.

THE COURT: All right. And what the Supreme Court said was, it was troubled that the judges were relying on a categorical approach. It's saying, well, you were convicted of this particular crime and often in the course of this particular crime violence can be used or is a part of it, the threat of violence or the actual violence. And the Courts had come up with a -- well, this crime falls into this category and so you, sir or madam, can be charged as an armed career criminal.

The Supreme Court said that was vague, and it couldn't be saved by what the lower courts started to do, and that is to do a case specific approach. And that is to say, all right, I'll look at the actual facts surrounding the crime

for which you were convicted and I'll try to determine whether there was any violence in that.

And the reason the Supreme Court threw that out under the, quote, vagueness doctrine was because it said that the purpose of the vagueness doctrine was to avoid arbitrary and capricious enforcement of the law. Is that consistent with your reading of *Davis*?

MR. WELLS: It is, which is an as-applied challenge.

THE COURT: All right. Now, we actually have litigants, state attorneys, the Sheriffs Association, other people in law enforcement that say in our county we will not enforce this statute. So what -- and you are referencing real world circumstances, am I not as the Court sitting here looking at a circumstances where we know going into this arbitrarily there are going to be safe havens in certain counties or certain towns in Illinois, and then there's going to be certain counties or certain towns in which there's going to be a very vigorous prosecution of this statute. Is that fair to say?

MR. WELLS: Your Honor, I think I'm aware that comments like that have been made. I would suggest that --

THE COURT: It's been filed in pleadings. This is what they're saying to us, right?

MR. WELLS: I understand, but Your Honor, this is the Plaintiffs have chosen to bring a facial challenge and

speculation about how the law may be enforced in certain counties or not enforced in other counties is beyond the scope of what is relevant in a facial challenge, respectfully. And I understand what has been filed and the positions that have been articulated by different members of law enforcement throughout the state, I understand that.

THE COURT: Doesn't *Davis* tell us by the invocation of the vagueness doctrine you can swat down that which you think is going to result in an arbitrary and capricious application of criminal laws?

MR. WELLS: Davis, again, is an as-applied challenge. And part of the challenge with this case is that it's a facial challenge.

THE COURT: Throughout all of it. We had to redo a lot of those cases.

MR. WELLS: I understand that, and there's a set of three cases that I know that deal with statutes that deal with residual clauses in criminal cases. I'm familiar and I understand what you're saying, but in most of those circumstances there have been years of courts trying to apply the specific language in those statutes and not settling on a standard and I think the Seventh Circuit specifically noted that distinction.

For instance, just in June of this year, June 16, 2023, in the *United States vs. Holden*, 70 F 4th 1015 1017,

reversing a dismissal of an indictment for lying on ATF Form 4473. Judge Easterbrook, writing for the Seventh Circuit, said, quote, the Supreme Court has told us that with -- that except with respect to a law invalid in every possible application or substantially overbroad with respect to speech, a statute's constitutionality must be assessed as-applied. The Plaintiffs have not brought an as-applied challenge. They have brought a facial challenge.

So will there be questions of statutory interpretation that come up in the future? Yes. Potentially. I think the Seventh Circuit recognizes that in the context of a facial versus as-applied challenge, but Plaintiffs have chosen to bring this as a facial challenge and under a facial challenge they have not met the standard.

THE COURT: All right. Let's talk about the things they did bring up. One magazine that you can buy with a handgun is legal, but it's interchangeable and can be used on a rifle. And let's say for purposes of argument an individual has both. Can that individual be prosecuted? Under this statute, does that individual violate this statute by having in the same gun safe a magazine and his pistol that can be ejected and put in a rifle?

MR. WELLS: I would say two things to that, Your Honor. First, the prosecutor would have to show that they knowingly possessed that for use in --

THE COURT: It's in your gun safe.

MR. WELLS: The rifle --

THE COURT: It just says possess. It's in your gun safe, sir.

MR. WELLS: The other rule that is at play here is the rule of lenity, Your Honor. In an actual specific prosecution, a defendant may have a good argument that the rule of lenity should apply. That's the problem with talking about these types of --

THE COURT: No, that's not a problem. We're faced with the real world situation with a statute where in some municipalities and in some counties there's going to a zealous prosecution of this statute. In other counties and municipalities there's going to be zero or very little. If someone possesses a magazine that has a 15 round capacity that can be put in a rifle, they may get a semi-automatic rifle and therefore have it and have a 15 round capacity and he violates that statute, doesn't he or she?

MR. WELLS: Again, Your Honor, there would have to be proof of mens rea. The other thing I would note, Your Honor, with respect to the example of differential enforcement in different counties, that's already true for many different criminal statutes.

THE COURT: Unfortunately, that's true.

MR. WELLS: That doesn't make out a constitutional

violation.

THE COURT: In this statute, they're attempting to criminalize conduct that is specifically referenced in the United States Constitution and which says the right to keep and bear arms shall not be infringed. This is infringed. It's regulated. It's taxed in the sense that you're going to have to pay some fees to register these things, and it is criminalized.

Even the first violation as a misdemeanor, that's still criminal law. The second one, as you know, all right, you lose this gun and every other gun you own, all the ammunition and anything else that is a weapon or arm that's gone, and you can't ever have it again. So this is a pretty daunting approach at addressing the exercise of a Second Amendment right, right? Unless we want to go preHeller and preBruan and say it's a balancing test. We get to decide if you have some guns and not others. We decide what gun you use to defend yourself, you don't. We decide what we think the threat to you is going to be, not you, and you're criminalizing it.

MR. WELLS: So, Your Honor, I would note that the issue of whether or not the statute actually infringes the Second Amendment is before the Seventh Circuit. So we're here today on a Fourteenth Amendment vagueness challenge. I understand the Court's concern about the question of whether

or not there may be Second Amendment or Second Amendment adjacent concerns implicated, but I don't think we know and we can't say it here today because the Seventh Circuit hasn't said it yet whether or not it's true that this is, in fact, the statute that infringes the Second Amendment or implicates the Second Amendment.

THE COURT: Well, I anxiously await their decision. But in the meantime, does this statute, does it apply to constructive possession? If my -- let's say the occupants of a household, one of them owns firearms or attachments that violate this statute. The other occupant of the household has access to the keys to the gun safe. I know they're in there. I know it's in there. I store some of my own stuff in there. Constructive possession, we see these cases all the time. Drug case, if there's drugs on the table, there's a firearm on the table and there's four people sitting around the table, they all get charged. Pull over a car, there's a gun under the seat of the car, all right, you're the driver of the car. It's not my gun. Well, it's your car. He's going to get charged or she's going to get charged and then they are left to hope that they can work out some deal with the prosecutor, and said you were in constructive possession. Does this statute allow for the prosecution of citizens who arguably are in constructive possession of these firearms?

MR. WELLS: Your Honor, again, it's a facial

challenge. Specific hypothetical situations are beyond the scope of what is relevant in a facial challenge. I understand the Court has these specific concerns obviously, and if there were a constructive possession case charged, a defendant can raise whatever constitutional defense they think is appropriate. The other thing I would note, Your Honor, again, there's a mens rea requirement that requires knowledge. I also heard Mr. Maag make reference to Staples. I agree. I think the Staples analysis would factor in here in how we look at mens rea. So while I understand the Court wants to speculate about particular situations, that is not --

THE COURT: I'm not speculating. I'm asking you. Does this statute allow for the prosecution of someone who is in constructive possession?

MR. WELLS: I think this statute would allow for prosecutions that are consistent with other prosecutions under the same statuary framework.

THE COURT: So with Mr. Maag's example, one magazine can be lawfully purchased if it's put in a pistol, but it can't be lawfully purchased if it's put in a rifle. Who decides is that a question of fact for the jury, is that a question of law for the judge? Who decides that?

MR. WELLS: I think it would, again, depend on the particular facts of the case. The question here is whether or not the statute has a core of understandable meaning.

THE COURT: Listen, I asked him questions and he didn't have an answer, okay, but I'm asking you. I understand vagueness, but if part of vagueness is arbitrary and capricious or if an ordinary citizen looks at the statute and is not alerted, hey, I can be violating the law here, that's problematic. Do you have an answer to my question or do you not want to answer the question?

MR. WELLS: Can you give me the precise question again, Your Honor?

THE COURT: All right. In a scenario as to a person being in possession of a magazine that let's say is housed or cased in a pistol, the magazine is 15 rounds, the person also has within his or her possession a semi-automatic rifle which would also receive that 15 round magazine. Is the question of possession of that magazine for purposes of violating this statute a question of law for the judge, a question of fact for the jury?

MR. WELLS: I think it would certainly implicate the rule of lenity and in that case it may be a question of law in that circumstance.

THE COURT: Can a dealer sell -- let's talk about a dealer that is looking to sell and can sell these 15 round magazines to handgun owners. A person comes in. Let's say he's a customer that the gun owner knows. The gun owner knows that at home the person has a semi-automatic rifle that could

receive the magazine that is being sold with the handgun. Does that dealer violate the statute?

MR. WELLS: Your Honor, I think --

THE COURT: Because I know, because I sold one to you last year, you've got a Beretta rifle semi-automatic this would work in.

MR. WELLS: Your Honor, again, I think the prosecution in that case would have to prove beyond a reasonable doubt that the person in that transaction knew that they were selling the magazine for a rifle. I don't think under the facts that you've articulated that there's proof beyond a reasonable doubt in that circumstance for the seller.

THE COURT: Question of law or question of fact for a jury?

MR. WELLS: I think it depends on how well developed the factual record is, but there's a good chance that it is a question of law.

THE COURT: Okay. When we -- AK like weapon, AR like weapon, who makes the determination of whether something is like one of these specifically identified firearms? Is that a question for the judge or is that a question for the jury?

MR. WELLS: I think in most instances, Your Honor, there's the categories based definition which provides notice, and there's the specific preparatory language that says something has to have the same capability of one of the listed

weapons. That could be a mixed question of fact and law. Capability is something that can potentially be disputed, but the mere prospect that some issues may have to be adjudicated, the Seventh Circuit precisely anticipates that. They specifically say in the --

THE COURT: Did that case specifically involve the exercise of a core constitutional order?

MR. WELLS: *The Trustees of Indiana University* case involved I believe abortion doctors so it used to. I don't know that it does any more, but that being said the Seventh Circuit has not differentiated that type of case from other cases that may implicate constitutional rights with the exception of the First Amendment. Yes, there is a specific set of overbreadth type arguments that can be made in the First Amendment context, but not in the Fourth Amendment context, not in the Sixth Amendment context, not in the Fifth Amendment context. We're not in the First Amendment context.

So while there may be some question about, okay, that is the specific standard? The Seventh Circuit has been very clear that outside of the First Amendment context there aren't these pre-enforcement facial overbreadth type challenges.

THE COURT: With this statute, the way it's set up, registration, recordkeeping, do you anticipate us judges getting requests to issue warrants based upon Government tracking of the purchase of ammunition and coming to a judge

and saying, well, we want a warrant for Joe Schmow's house because he's buying a heck of a lot of ammunition normally used in an AR-15 like weapon and he doesn't have registered with us any AR-15 records and based upon our experience with the ammunition and with the amount of frequency in which he's purchasing this ammunition we believe he may have violated this statute? Should we anticipate receiving such requests?

MR. WELLS: Your Honor, again, subject to my usual response which is it's a facial challenge and that specific scenario is beyond the scope of the facial challenge, the mere fact of a particular caliber of ammunition being purchased I do not know that that would rise to the level of giving probable cause for a warrant. That's going to be a question that is heavily dependent on what evidence the Government actually comes forward with.

THE COURT: All right. I'm out of questions. If you want to keep arguing, I'm all ears.

MR. WELLS: Your Honor, you are familiar with our arguments. The motion should be denied because the statute has a core of understandable meaning. There's a mens rea requirement and the scope of any relief should be limited to what the terms of the statute that Plaintiffs have specifically argued about. So with that, I appreciate the Court's time. Thank you.

THE COURT: Thank you. Mr. Maag, just because it's

hostile to the Second Amendment doesn't mean it's vague, is that true?

MR. MAAG: I'm sorry. I didn't --

THE COURT: Just because the statute may be hostile to the free exercise of the Second Amendment doesn't mean it is vague?

MR. MAAG: That's what I thought you said. I just wanted to make sure. I agree that the mere fact that the statute is hostile to a fundamental constitutional right is not ipso facto. I mean, it's unconstitutionally vague. This case, however, is both hostile to the Second Amendment and largely unconstitutionally vague.

THE COURT: I asked you, didn't this statute have a discernible core meaning, and it puts the citizens on fair notice of what is being regulated and what is being criminalized?

MR. MAAG: What it puts citizens on notice of is that the state government considers the Second Amendment a second class right, and the state government will do anything and everything it can to prohibit the free exercise of those Second Amendment rights.

THE COURT: But if they're open and obvious about it, that's not vagueness. That's just in your face.

MR. MAAG: That's true in part. For instance, the section of the statute (A)(1)(a), definition of assault weapon

including a semi-automatic rifle with a pistol grip or thumb hold stock and various features, I could argue with an absolute straight face and possibly even convince a court that pistol grip is vague because pistol grip is a term of art that's been used for firearms for hundreds of years long before they referred to what sticks below an AR-15 or MR-16 as a pistol grip stock, but more or less --

MR. WELLS: Your Honor.

THE COURT: I'm sorry. Hold on.

MR. WELLS: I don't want to -- I don't mean to interrupt Mr. Maag, but obviously to the extent that he's raising arguments about vagueness that weren't raised in the motion itself, I'm going to object to that. It just wanted to note the objection.

THE COURT: I'll let you guys get your $0.10 in. I will let you get your $5.60 in. Whatever it takes, I'm going to let you make your record.

MR. MAAG: I agree that I could make some various arguments. At least with the features test, there is a reasonable chance more or less that a person could figure out whether or not a firearm had a folding telescoping thumb hole or detachable stock, that's mechanically objectively determined.

THE COURT: Isn't that enough to save the statute?

MR. MAAG: It might be enough if they had stopped

there. It would be, for instance --

THE COURT: What if I stop them there?

MR. MAAG: That might be within your discretion. It may be within your discretion to determine that the entirety of the statute, at least as it pertains to firearms, the legislature intended the features test and the variance duplicates examples to work in tandem, and I think that is what they intended to do, but the problem is by intending to do that, they made an unworkable -- in going to their own assault weapon identification guide that they filed, on page 24, we go back to SKS detachable magazine.

As near as I can tell, an SKS with a detachable magazine especially as pictured in this on page 24 doesn't fail the features test. It appears to be only here because somebody at the legislature had a book with scary looking firearms and including it on there.

THE COURT: Well, if it's in there you know you can't possess it, even if this thing isn't like the other things. If they say we are banning this one, you can't own it.

MR. MAAG: What they have a picture of is technically not even an SKS. If you want to get ultra technical that's Chinese type 56 carbine. You can tell from the spiked bayonet. The SKS is Soviet/Russian designed firearm and while there's a great deal of similarities, it doesn't have a spiked bayonet like that. So that firearm will have no markings on

it whatsoever --

THE COURT: But doesn't that just highlight the arguments that the Government was saying, that even if you can poke some holes in the application of this statute to certain real world circumstances, that's not grounds to invalidate the whole statute. That's just something for judges to help clean up as these cases go forward and say this is an unreasonable application of this statute related to these particular circumstances, whether it's these particular guns or these particular add-ons or these facts about constructive possession.

MR. MAAG: As cited by the US Supreme Court cited in my brief, *Grayned versus City of Rockford*, US Supreme Court 1972, vague was to create the risk of arbitrary and discriminatory enforcement by police.

THE COURT: Which is why I brought up *Davis*, that the vagueness doctrine and the application was to avoid arbitrary enforcement of that particular statute and said you can't do it. And it's not saved by judges converting it from a categorical approach to a specific facts approach, right? So under -- go ahead.

MR. MAAG: But there's also the third test is it may have a chilling effect on guaranteed rights. The chilling effect is not necessarily saying it violates it, but there is certain conduct that even the most strict court on the Second

Amendment will say, yes, there's a point of which some legislation will violate that. This statute, there are firearms that are indisputable arguably a copy or a variance of an AK or an AR, whatever that means, that somebody will pick out that this is an AR variance that will be constitutionally protected. This statute puts a chilling effect on the citizens of Illinois from being able to acquire that because they're going to look at this statute and say, well, this says I can't have a variant of an AK or an AR. I'm not exactly sure what that means. There's no flash suppressor on this gun. It's not even a detachable magazine because they welded the magazine in place. There is no pistol grip on it. The stock doesn't fold or telescope, but, you know, I can see that there's some technological similarity there. Is that gun prohibited?

And that is the chilling effect on this and guns too. There is no objectively defined AR or AK. I'm not sure how you could define it. And that's basically the point of the *Springfield Armory* case that I've cited out of the Sixth Circuit.

If they had simply stopped, they being the legislature, with the features test and had the legislature simply stopped and said we are going to come up with a magazine limit across the board, I'm not sure I can stand here today and argue vagueness. But that's not what they did. And

the legislature is stuck with what they did.

And what they did was make a mess that, sure, if it's got a flash suppresser, a folding stock and I can think of grenade launcher attached to the firearm that it might be an assault weapon. We can figure that out. But if you take those things off, even if it sort of looks the same, even if it is a different caliber, how much different must it be? If we're talking about a magazine capacity, if we drop a 13 round magazine on the table here, is that legal or not? We don't know. And that is where the legislature screwed up.

That's not to say, Second Amendment issues aside, that they couldn't fix that. But they haven't fixed that. And for those reasons and the reasons previously made of record, I believe that both the magazine capacity limitations and subsection J at least, which is the rifles copies, duplicates, also goes to pistols, shotguns in the other section, is unconstitutionally vague. I ask for summary judgment in favor of the Langley Plaintiffs on those issues as moved forward in my motion, and I ask for an injunction against enforcement of same. I understand there's a severability issue. I believe the Court has the discretion because it is a substantial part of the statute to enjoin the entire statute as part of it. I understand that that is something the Court may have to grapple with, but that's what I'm asking for.

THE COURT: Thank you. You want to address the argument of chilling of the exercise of Second Amendment rights, or anything else that he raised that you think he didn't raise in his initial argument?

MR. WELLS: Sure, Your Honor. Just three quick points on the issue of severability. Mr. Maag has essentially conceded that the features based test is not being challenged here. So obviously, any relief that he's requested can't go to the features based test. *Davis* -- Your Honor, brought up *Davis*, those -- *Davis* and the other two cases that are kind of contemporaneous with *Davis*, including *Johnson*, those deal with residual clauses and the relief in those particular cases is specific to those residual clauses, not to the entire criminal statute of which those residual clauses were part. *Springfield Armory*, Mr. Maag brought up *Springfield Armory*, we've distinguished that in the briefs. *Springfield Armory* itself says other gun control laws which seek to outlaw assault weapons provided general definition of the type of weapon ban and the Columbus City Council can do the same. And they cite the Federal Assault Weapons ban that had a features based definition and a characteristics based definition. So this statute unambiguously has a features based definition and a make and model list. So *Springfield Armory* is distinguishable by it its own terms, and for this reasons, Your Honor, we believe that the motion should be denied.

Thank you.

THE COURT: Do you have anything to say about the chilling effect the statute has on the exercise of the Second Amendment rights as argued by Mr. Maag?

MR. WELLS: Again, I would note my prior response that it's not clear the Second Amendments rights at this point have been implemented. We will hear about that from the Seventh Circuit and maybe --

THE COURT: They are clearly implicated. They're arms. They're arms so the Second Amendment is implicated. What we're waiting to hear from the Seventh Circuit and others is whether the Supreme Court is going to accept these clear restrictions on the exercise of the Second Amendment, attached to nothing other than the exercise to keep and bear arms. The Second Amendment is implicated. The question is whether -- not whether the Second Amendment is implicated. The question is can this statute survive judicial scrutiny and somehow find that it does not infringe on the rights of citizens to exercise their Second Amendment rights.

So the Second Amendment is clearly implicated and it's not a second class right as the Supreme Court says. The only question is whether or not the Courts are going to allow the states to restrict these particular types of weapons, some, all, none. That's up in the air. And when I ruled earlier, I didn't get to whether some of these can be

restricted, that none of them could be restricted. I didn't say anything like that. I just said there are some that are clearly widely held and possessed and that that test -- some of the restrictions that are imposed can't pass that test.

The Seventh Circuit can let us know whether I was right or wrong on that. The judge in the Northern District that saw it a different way, they're going to let her know whether she was right or wrong on that. This is a Second Amendment case. It is clearly implicated and so evaluating this statute, the criminalization of the exercise of Second Amendment rights, I think that that -- you got to thread the needle on that. It's not like, oh, well, we're going to let this broad statute go through and we'll try to clean up the mess later. It is some parts or all. I think when you're criminalizing the pure exercise of the constitutional right, if you can do it, then you're going to have to be very precise, as I say thread the needle, and get it just right. This law is not too hot. It's not too cold. It's just right, okay?

MR. WELLS: Your Honor, may I say just two quick things in response to that. I don't know if I answered directly your question about chilling effect. The thing I would say is that chilling effect analysis has only been applied in First Amendment cases in void for vagueness doctrine. It has not been applied to date in Second Amendment

cases. That's what I would note on that point. And again, I think as Your Honor acknowledged, this broader statute, the fundamental question is about the Second Amendment. The Seventh Circuit has the Second Amendment piece to this case. We're here on 14th Amendment due process claims. With all due respect to Mr. Maag and his arguments, I think they are not going to be what ultimately decides the validity of the statute. That will be decided as a Second Amendment issue. That's all, Your Honor.

THE COURT: All right. Thank you. Mr. Maag, anything else?

MR. MAAG: Not at this time. Thank you.

THE COURT: All right. I'll take this case under advisement. Thank you all.

REPORTER'S CERTIFICATE

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I, Erikia T. Schuster, RPR, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported with mechanical stenography the proceedings contained in pages 1-55 and that the same is a full, true, correct and complete transcript from the record of proceedings in the above-entitled matter.

/S/ Erikia T. Schuster 10/12/23
IL CSR, RPR